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In The

Supreme Court of the United States

October Term, 1993

SILVIA S. IBANEZ,

Petitioner,

v.

STATE OF FLORIDA,
DEPARTMENT OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Respondent.

On Writ Of Certiorari
To The District Court Of Appeals Of Florida
For The First District

BRIEF AMICI CURIAE OF THE CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, AND CENTRAL FLORIDA SOCIETY, JACKSONVILLE SOCIETY, SOUTH FLORIDA SOCIETY, SOUTHWEST FLORIDA SOCIETY AND TAMPA BAY SOCIETY OF THE INSTITUTE OF CERTIFIED FINANCIAL PLANNERS IN SUPPORT OF PETITIONER

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CONSENT OF THE PARTIES

Petitioner, Silvia S. Ibanez, and Respondent, State of Florida, Department of Business and Professional Regulation, Board of Accountancy, have consented to the participation of the Certified Financial Planner Board of Standards, Inc. (prior to February 1, 1994, known as the International Board of Standards and Practices for Certified Financial Planners), and the Central Florida Society, the Jacksonville Society, the South Florida Society, the Southwest Florida Society, and the Tampa Bay Society of the Institute of Certified Financial Planners, in these proceedings as amici curiae in support of the Petitioner. Their consents have been filed with this Court.

SUMMARY OF ARGUMENT

The State of Florida, Department of Business and Professional Regulation, Board of Accountancy (BOA) regulation categorically prohibiting use of truthful certification marks granted by the Certified Financial Planner Board of Standards, Inc. (CFP Board) violates the standard for commercial speech under the First Amendment.

A. The BOA regulation prohibiting use of CFP and CERTIFIED FINANCIAL PLANNER is analogous to the fact situation of *Peel v. Attorney Disciplinary Commission of Illinois,* 496 U.S. 91 (1990), and therefore, is unconstitutional. Truthful statements of certification, professional qualifications, and specialization are valuable commercial information. Certification provides valuable information to consumers concerning the nature of services available from competing professionals. Claims of certification are

true and verifiable and, absent evidence to the contrary, they are not actually or inherently misleading. Although claims of certification have the potential of misleading, this does not justify a state's regulation categorically prohibiting the use of such claims.

B. The BOA's restrictions on truthful professional and specialization claims, which are not within the practice of public accounting, are more burdensome than the regulation at issue in *Peel*. Such restrictions go well beyond the proper scope and extent of restrictions designed to achieve a legitimate governmental interest.

INTEREST OF AMICI CURIAE

The Certified Financial Planner Board of Standards, Inc. (CFP Board) is a private, not-for-profit standards-setting, credentialing, marks licensing and disciplinary body for Certified Financial Planner and CFP licensees. The mission of the CFP Board is to benefit and protect the public by setting qualifications for initial professional certification, protect its federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER, to develop and administer continuing post-certification requirements and disciplinary procedures for licensees, and to encourage both certification attainment and certification retention of those persons licensed, thereby enhancing the professionalism of those engaged in the exercise and pursuit of financial planning.

The CFP and CERTIFIED FINANCIAL PLANNER marks were first placed in commerce during the early 1970's by the College for Financial Planning (College), a

Denver-based educational institution. They are distinct, federally registered service marks, which are not synonymous with one another. The College and the Institute of Certified Financial Planners (ICFP) created the International Board of Standards and Practices of Certified Financial Planners (IBCFP), recently renamed Certified Financial Planner Board of Standards (CFP Board), in 1985 and the CFP Board was given ownership of the federally registered service marks, CFP and CERTIFIED FINANCIAL PLANNER in 1986. By 1988, it could be said that "the CFP designation was the most prominent professional qualification of planners and product sales employees, held by 26% of planner employees and 25% of the product sales employees. . . . The CFP designation appears to be developing as the most recognized designation in the planning field."[1]

The CFP Board at present has approximately 27,000 persons nationwide which it has licensed to use both of its marks (CFP and CERTIFIED FINANCIAL PLANNER), all of whom have met its examination, experience, education and ethics requirements, and who continue to meet its post-certification requirements. Approximately 4,600 of these persons are dually licensed both as Certified Public Accountants (CPAs) and CFP licensees. In the State of Florida, approximately 1,400 persons are CFP licensees and over 200 are additionally licensed as CPAs.

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[1] See Financial Planners: Report of the Staff of the United States Securities and Exchange Commission to the House Committee on Energy and Commerce's Subcommittee on Telecommunications and Finance, 53 (February 1988) (Financial Planners Study).

The Central Florida Society, the Jacksonville Society, the South Florida Society, the Southwest Florida Society, and the Tampa Bay Society of the Institute of Certified Financial Planners (Florida Societies) are affiliated societies of the Institute of Certified Financial Planners (ICFP). The ICFP is a not-for-profit voluntary membership association of CFP licensees that calls on its members to aspire to the highest levels of ethical conduct, personal development, professional competence, and service to the public. The Societies are local bodies which assist the ICFP in pursuit of its goals for member education and public awareness by providing a credible source for financial planning information and for promotion of the CFP licensees to members, the general public and regulators. Membership in the Central Florida Society of the ICFP currently numbers approximately 247 CFP licensees, in the Jacksonville Society 71, in the South Florida Society 291, in the Southwest Florida Society 90, and in the Tampa Bay Society 475. Many of their members are CPAs in addition to being CFP designees.

It is the mutual concern of the CFP Board and the Florida Societies that if this order of the BOA is permitted to stand, it will establish an unfortunate precedent in each of the following respects, which this Court should not condone or affirm:

(1) If other disciplines are permitted to enforce a blanket suppression on use of the CFP and CERTIFIED FINANCIAL PLANNER credentials, by persons qualified by the CFP Board to use the marks, consumers will be denied information as to professionally qualified planners who are best able to help them with their problems. Consumers will suffer because: (a) they are unable to

ascertain professionals with the most appropriate qualifications; and (b) because this precedent will discourage additional financial planners from seeking the additional qualifications and self-regulatory constraints that the CFP designation represents.

(2) Beyond the immediate infringement of Ibanez's First Amendment rights, this order poses imminent and significant dangers to important First Amendment rights of each of the 200 CPA-CFP licensees practicing in Florida, and exposes each to a similar risk of unwarranted discipline.

(3) In addition, because of the likelihood of nationwide publicity about the BOA's order, all of the other 4,600 CPA-CFP licensees who practice outside the state of Florida stand to be placed at similar risk of losing important First Amendment rights as other states may seek to emulate the Florida BOA action.

STATEMENT

Petitioner, Silvia S. Ibanez, is a practicing attorney and a member of the Florida Bar since 1983. Petitioner (Ibanez) is also a licensed Certified Public Accountant (CPA). Ibanez was licensed to use the marks CERTIFIED FINANCIAL PLANNER and CFP in 1989. Ibanez has been actively licensed as a CFP licensee in good standing with the CFP Board, the recognized licensing authority for the CFP and CERTIFIED FINANCIAL PLANNER credential. J.A. 150. The CFP Board was created to improve the quality of financial planning by developing and

enforcing standards and providing a national credentialing process. The CFP Board certifies individuals who meet specified standards of experience, education and ability in financial planning.

Ibanez was listed in the "Attorney" yellow pages as "Ibanez, Silvia S., CPA, CFP." She was also listed in the white pages as "Ibanez, Silvia S., CPA, CFP, atty." *Id.*, at 151.

A person anonymously mailed to the BOA a copy of the yellow pages, which included Ibanez's listing, and circled her name. The BOA then instituted disciplinary action against Ibanez. On January 15, 1992, a hearing officer issued a recommended order that all charges against Ibanez be dismissed. *Id.*, at 174. The BOA subsequently disregarded the recommendation and found Ibanez in violation of Rule 21A-24.001. *Id.*, at 194. Ibanez appealed, but the decision was affirmed per curiam. *Id.*, at 196.

As to the use of CFP and CERTIFIED FINANCIAL PLANNER, the basis for the discipline is the BOA's finding that this listing constituted "false, deceptive and misleading advertising by implying a specialty of public accountancy, not recognized by the Board of Accountancy," in violation of F.A.C. 21A-24.001, and therefore, Section 473.323(1)(f), F.S. *Id.*, at 194. Insofar as the BOA offered any rationale, it cited F.A.C. 21A-24001(1)(i) which prohibits CPAs, inter alia, from advertising any "form of recognition by any entity other than the Board that uses the term 'certified' . . . . " *Id.*, at 192.

ARGUMENT

I. Certified Public Accountants have a constitutional right, under the standards for commercial speech, to advertise their truthful certification by the CFP Board as a CFP and CERTIFIED FINANCIAL PLANNER licensee.

Although the First Amendment provides less protection to commercial speech than to non-commercial speech, this Court has recognized the importance of commercial speech in a competitive market. Commercial information enables consumers to make better informed judgments in procuring services of professionals. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1976). In recognition of the importance of commercial speech, this Court's approach has been that states may only proscribe dissemination of commercial speech which is false, misleading or deceptive. *Zauderer v. Office of Disciplinary Counsel*, 105 S.Ct. 2265 (1985).

Commercial speech which is not false, misleading or deceptive and does not concern unlawful activities may be restricted (a) only to achieve a substantial government interest, and (b) only with restrictions that directly advance that interest, and (c) are no more extensive than necessary to effectuate that interest. *Central Hudson Gas and Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

In *Peel v. Attorney Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), this Court considered the validity under the First Amendment of a disciplinary rule

adopted by the State of Illinois which prohibited attorneys from claims of certification and specialization. Petitioner's case bears a marked resemblance to the *Peel* case.

Peel, a licensed attorney, placed on his letterhead stationery, between his name and the states in which he was licensed to practice, the following statement: "Certified Civil Trial Specialist by the National Board of Trial Advocacy." *Id.*, at 96. The Attorney Registration and Disciplinary Commission of Illinois (ARD) found Peel in violation of the rule prohibiting attorneys from claiming specialization and certification and recommended censure. *Id.*, at 97.

On review, this Court's analysis began with the observation that advertising was a form of commercial speech protected by the First Amendment. *Bates v. Arizona*, 433 U.S. 350 (1977). Although the First Amendment protects truthful advertisements, misleading advertising may be entirely prohibited. Further, states may not place an absolute prohibition on advertising that is potentially misleading if the information may be conveyed in a way that would not be deceptive. However, even non-misleading advertisements may be regulated, but the state must assert a substantial interest and the interference must be in proportion to the interest served. *In re R.M.J.*, 455 U.S. 191 (1982).

This Court then held that Peel's certification was true and verifiable. *Peel*, 496 U.S., at 100. Peel's claim of certification was not actually misleading because there were not factual findings of actual deception or misunderstanding. *Id.*, at 106. Although this Court concluded that claims of certification "may not be fully understood" by

consumers and, therefore, may be potentially misleading, the state's blanket prohibition was broader than necessary to prevent the harm. *Id.*, at 107. "Even if we assume that Petitioner's letterhead may be potentially misleading to some consumers, that potential does not satisfy the state's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Id.*, at 109.

This Court then specifically stated: "A State may not . . . completely ban statements that are not actually or inherently misleading, *such as certification as a specialist by a bona fide organization* such as NBTA." *Peel*, 496 U.S., at 110 (emphasis added).

A. The BOA regulation prohibiting use of CFP and CERTIFIED FINANCIAL PLANNER is analogous to the fact situation of *Peel* and therefore is unconstitutional.

In *Peel*, this Court held unconstitutional the ARD's rule categorically prohibiting use of truthful certification by a bona fide national organization. This Court reasoned that the ARD's categorical prohibition of the term "certified specialist" did not satisfy the Central Hudson test and was, therefore, unconstitutional. Although the government interest of protecting consumers from false or misleading advertising is substantial, this Court held that an absolute prohibition was more extensive than necessary to effectuate that interest.

As in *Peel*, the BOA promulgated F.A.C. 21A-24.001 (1)(i), a blanket prohibition on the use of the term certified, on grounds of protecting the public from false and

misleading advertising. Ibanez, like Peel, holds a certification (CFP) from a bona fide national organization (CFP Board). Ibanez's actions in listing her CFP designation on her letterhead, business card and in the yellow pages, likewise, should be regarded as commercial speech, since the CFP credential is used generally in a commercial or business context. The BOA, like the ARD in *Peel*, seeks to discipline Ibanez for the use of truthful, commercial speech on grounds that it is false, deceptive and misleading advertising by implying a specialty of public accountancy, not recognized by the Board of Accountancy.

1. **Petitioner's certification to use the CFP credential is true and a verifiable fact, as are the predicate requirements for that CFP certification.**

It is undisputed that Petitioner has been licensed to use the marks CFP and CERTIFIED FINANCIAL PLANNER since 1989. There are no findings or allegations that anyone has been misled or deceived by Petitioner's use of the CFP mark.

"[I]f the certification had been issued by an organization that had made no inquiry into Petitioner's fitness, or by one that issued certificates indiscriminately for a price, the statement [(certification by the NBTA)], even if true could be misleading." *Peel* 496 U.S. at 102. As in *Peel*, the CFP Board's standards for granting the license to use its marks is objectively clear and there is no evidence that a claim of certification by the CFP Board suggests any

greater degree of professional qualification than may be reasonably inferred from its rigorous requirements.

In its initial certification and marks licensure requirements, in its post-certification requirements, and in its requirements for compliance with the CFP Board's *Code of Ethics and Professional Responsibility*, the CFP Board demands professionalism of persons it authorizes to use its marks. An applicant for the CFP or Certified Financial Planner marks must complete an educational program registered with the CFP Board in six general areas of personal financial planning, must have experience in the area of financial services, must pass a rigorous, comprehensive examination on the six subject areas of personal financial planning, and must not only sign an ethics declaration agreeing to abide by the CFP Board's *Code of Ethics and Professional Responsibility* but must also disclose any previous or then-existing ethics violations or investigations by any regulatory or self-regulatory organization. According to one government source, ". . . . The CFP designation appears to be developing as the most recognized designation in the planning field."[2]

Prior to the CFP Board of Standards' creation, the only way to obtain the CFP or CERTIFIED FINANCIAL PLANNER marks was through the College for Financial Planning (College). The CFP Board was created in part to

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[2] See Financial Planners: Report of the Staff of the United States Securities and Exchange Commission to the House Committee on Energy and Commerce's Subcommittee on Telecommunications and Finance, 53 (February 1988) (Financial Planners Study).

allow curriculum offerings at many colleges and universities to be registered by the CFP Board so that students from those educational institutions could sit for the established examinations and complete the certification process. Today over 50 programs at U.S. accredited colleges and universities have applied for and received CFP Board registration, ranging from well known schools to lesser known educational institutions of higher learning.[3]

[3] *Schools offering graduate degrees*: City University, Georgia State University, Golden Gate University, Loyola University, Northeastern University, Nova University, San Diego State University, Texas Tech University, University of Dallas, University of Miami, Walsh College, Old Dominion University. *Undergraduate degree programs are offered by* Barry University, Baylor University, California State University – Chico, California State University – Fresno, California State University – Fullerton, Campbell University, Golden Gate University, Mankato State University, Mercyhurst College, Metropolitan State College, Mississippi State University, Purdue University, San Diego State University, Southwest Texas State University, Texas Tech University, University of Alabama, University of North Texas, University of Northern Colorado, Western Kentucky University, Wright State University. *Certificate programs are offered by* Boston University, City University, College for Financial Planning, Fairleigh Dickinson University, Georgia Southern University, Lehman College, Long Island University, Manchester Community College, Merrimack College, New York University, Oakland University, Pace University, Rockland County Community College, Rollins College, Southwest Texas State University, University of California – Berkeley, University of California – Irvine, University of California – Los Angeles, University of California – Riverside, University of Central Florida, University of Houston, University of North Texas, University of Tennessee. *Associate degree programs are offered by* Waukesha County Technical College.

Registration means that the curriculum is taught at an upper division (junior, senior or graduate) level, and is comprised of no less than 180 classroom hours covering the CFP Board-defined core curriculum. This core curriculum was established on the basis of an extensive financial planner job analysis conducted for the CFP Board in 1987 and includes six major areas: Fundamentals of Financial Planning; Insurance Planning; Investment Planning; Income Tax Planning; Retirement Planning and Employee Benefits; and, Estate Planning. Within these six core areas there are 175 specific topics that constitute the model curriculum. Furthermore, the CFP Board recommends, in addition to the core curriculum, prerequisite courses in the following areas for students: Principles of Economics; Money and Banking; Principles of Financial Accounting; Financial Management; Business Law; Business Ethics; and Communication Skills or Personal Counseling.

After completion of the educational requirement at any one of the aforesaid registered programs, a CFP candidate must pass a comprehensive certification examination similar in concept to the Bar or CPA examinations. The examination has been developed by the CFP Board based upon established psychometric principles, and standards for educational testing developed by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education.[4] The four-session exam is administered over two days with an historical pass rate

[4] See American Educational Research Association, et al., *Standards for Educational and Psychological Testing* (1985).

of about 55%. It is designed to assess the ability of candidates to apply financial planning education to financial planning situations in an integrated format, thereby protecting the public by assuring that persons are at an appropriate level of competency to practice in the field.

In addition to the education and examination requirements, the candidate must complete a financial planning-related work experience requirement. The work experience requirement is built around a "basic requirement" of a baccalaureate degree and three years of work experience. But credit is given to those with advanced financial planning-related education by decreasing the number of years of work experience required (for example, one year for those with a graduate degree in business or consumer economics, personal financial planning or financial services, or a J.D. degree from an institution accredited by one of the six regional accreditation agencies); and an alternative path for those with on-the-job learning but without a baccalaureate degree may be eligible (for example, five years of experience for those without a degree). The actual number of hours of required experience thus ranges from 2,000 hours for those who have obtained a graduate degree to 10,000 hours for those who have only completed the examination requirement. Flexibility in these requirements is designed to break down barriers to certification and practice in the field.

Once a candidate has completed the education, examination and work experience requirements, he or she must not only sign an ethics declaration agreeing to abide by the *Code of Ethics and Professional Responsibility*, but must also disclose past or pending litigation or government agency or self-regulatory disciplinary proceedings

involving the candidate. Further, after being licensed to use the marks, a licensee must continue to meet post-certification requirements which includes an annual ethics statement and registration, completion of 30 hours of continuing education every two years, and continued adherence to the *Code of Ethics and Professional Responsibility*.

Because of the rigorous standards, and the CFP Board's adherence to the certification and license processes established by the National Organization for Competency Assurance, the CFP and CERTIFIED FINANCIAL PLANNER marks are not "devoid of intrinsic meaning" and are not, therefore, actually or inherently misleading. *Peel*, 496 U.S. at 112.

2. On this record, the BOA regulation specifically prohibiting use of any designation that uses the term "certified" is in error.

Insofar as the BOA offers any rationale for prohibiting use of the CFP mark, the BOA expressly cites F.A.C. 21A-24001(1)(i), which prohibits CPAs from advertising any form of recognition by any entity other than the Board that uses the term "certified". The BOA declares that its prohibition of designations which use the term "certified" by CPAs practicing accounting, when those designations have not been approved by the BOA as specialties in the practice, inherently mislead the public into believing that state approval and recognition exist. J.A. 194.

With no finding that a misleading effect has ever occurred, it seems no more likely in the present case than

in *Peel* that Petitioner's use of her CFP designation, granted by an established and recognized national organization, would be confused with formal state recognition. To the extent the CFP Board carries out a campaign of public communication and advertising, as it does, the public in general is further informed that the CFP mark originates with an independent self-regulatory organization rather than with a governmental body.

3. The BOA's regulation is broader than reasonably necessary.

The CFP Board does not question that the regulation of public accounting is a substantial government interest. The CFP Board believes, however, that the regulation at issue is broader than necessary to reasonably effect that purpose.

Although the CFP and CERTIFIED FINANCIAL PLANNER marks are not inherently misleading, they may be considered potentially misleading under the reasoning expressed in *Peel* (certification, though truthful, may not be understood fully by some readers). *Peel*, 496 U.S. at 106. Even assuming that the marks are considered potentially misleading, "that assumption does not satisfy the State's heavy burden of justifying a categorical prohibition against dissemination of accurate, factual information to the public." *Id.*, at 109.

The BOA, as the ARD in *Peel*, is constrained by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information. *Virginia*

Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

The relationship between professionals who provide services and the consumers who purchase those services is often characterized by asymmetric information. Voluntary certification is a market response to this informational asymmetry. Brief for Federal Trade Commission as Amicus Curiae at 18, *Peel*. By signifying that the professional's qualifications satisfy some objective standard, legitimate certification mechanisms facilitate consumers' differentiation of professionals "between those who possess certain desired characteristics and those who do not." W. Gellhorn, *Individual Freedom and Government Restraints* 147 (1956).

Democratic society requires regulation for the protection of its citizens. Although governmental regulation is widespread, it is more expensive, more rigid, and less effective than self-regulation, because self-regulation directly involves those who have the best knowledge about the need for action and the most incentive to take action. Self-regulatory activities include professional credentialing and academic accreditation to ensure qualifications and competence in individuals and institutions. Credentialing promotes competition by facilitating informed choice, responsible professional and institutional conduct, and excellence in professional services and education. J. Jacobs, *Certification and Accreditation Law Handbook* 6 (1992).

The importance of truthful, commercial free speech in the field of financial planning is even more important

than in other fields because of consumer needs and marketplace forces. Financial planning and other types of investment advisory services are in demand by consumers at all levels of income and sophistication.[5] Because of the exponential growth in the industry and its relative lack of regulation, the opportunity for clients of all levels of income and sophistication to be harmed is significant. (*Ibid.*) At present, the principal government regulatory mechanism for financial planners occurs under the SEC administered Investment Advisers Act of 1940, and under similar state statutes. Unqualified financial planners are a significant problem (*Ibid.* 20, 18) for consumers, and the existence of an ascertainable, independent certification in this field is valuable and rare in a competitive marketplace. So is full disclosure of material information about the financial planning practitioner to consumers. Under the CFP Board *Code of Ethics and Professional Responsibility,* disclosure required of CFP licensees exceeds requirements under federal and state regulations.

Article Third, section (a)(8) of the CFP Board's Articles of Incorporation states that one of the purposes of the CFP Board is to lessen the burdens of government by cooperating with and assisting state and federal regulatory agencies to appropriately, effectively and uniformly regulate professional financial planners. In this capacity, the CFP Board is fulfilling a valuable public purpose as a self-regulatory, voluntary certification and standards-setting body. Present governmental regulation of financial planners is not adequate because it is not sufficiently

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[5] H.R. Rep. No. 103-75, 103D Cong., 1st Sess. 18 (1993).

comprehensive, and fails to incorporate diverse disciplines such as securities, insurance and banking which are merging into one field of financial service and financial planning. As explained in the Interest section, above, the CFP designation is designed to answer the need for qualified and competent financial planners, by establishing comprehensive certification criteria which help set CFP licensees apart from other financial planners, and by positioning the CFP Board as the standard-setting organization for CFP licensees. The BOA rule will deny all 200 Florida CPA-CFP licensees the ability to identify themselves as CPA-CFP licensees to Florida consumers who are thereby denied access to this important information.

As in *Peel,* the BOA's concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment. Disclosure of information about Petitioner's certification by the CFP Board to use the marks CFP and CERTIFIED FINANCIAL PLANNER both serves the public interest and encourages the development and utilization of meritorious certification programs for financial planners. The BOA's prohibitions of Petitioner's certification claims are broader than necessary to achieve the BOA's legitimate governmental objectives and may not stand.

B. The BOA restrictions on truthful professional claims, which are not within the practice of public accounting, are more burdensome than the regulation at issue in *Peel.*

There are several important issues here. First, through the regulations at issue, the BOA presumes to

make personal financial planning a subset of the practice of public accountancy. Second, the BOA regulations unreasonably abridge the CFP Board's ownership rights in its federally registered service marks.

1. The BOA has no statutory authority to regulate other disciplines or occupations, such as financial planning, over which the BOA has no jurisdiction.

In *Peel*, the ARD sought to regulate specialties within the profession of law. Members of the *Peel* Court were concerned that it would embroil itself in the micro-management of professions that were within the State's inherent authority. *Peel*, 496 U.S. 119 (O'Connor, J. dissenting). This is not the concern in this case. This case goes beyond that case in that financial planning is not a specialty of accounting, it is a separate and distinct discipline.

Although the BOA has ruled in written opinions that CFP is an unsanctioned specialty designation of the discipline of accounting, it "has promulgated no rule concerning CFP specifically and has failed to prove up any rationale for its policy with regard to "CFP" or "CERTIFIED FINANCIAL PLANNER" contained in its letter opinions." J.A. 157.

The BOA rules prohibit the use of specialty designations in any aspect of the practice of public accountancy unless the advertisement states that the use of the term is a self-designation and/or is not sanctioned by the state or federal government. The only exception is if the terms and recognition have been approved by the BOA and, to

our knowledge, no such terms or recognition have been so approved.

Through its rules, the BOA presumes to make personal financial planning a subset of the practice of public accountancy. The CFP Board maintains this is clearly not the case. The profession of personal financial planning generally is considered to be separate and distinct from the practice of public accountancy just as is the practice of law, architecture and engineering. The CFP mark neither states nor implies that the holder has received formal recognition in any other field or specialty. Specifically, the CFP mark is not considered by the CFP Board to be a specialty of the practice of public accounting or to be a specialty of CPAs.

Although The American Institute of Certified Public Accountants (AICPA), which is a national voluntary membership organization of CPAs, has more recently developed its own specialty designation for its members who meet its requirements which is called "Personal Financial Specialist" (PFS), that designation is awarded by the Specialization Accreditation Board of the AICPA and is in no way connected with the CFP Board designations, CFP and CERTIFIED FINANCIAL PLANNER. It is instructive to note, in this regard, that a recent survey published in the Journal of Accountancy reported that the CFP designation was more popular with the survey respondents (Personal Financial Planner division members) than the PFS mark. The reason given was that the respondents were more familiar with CFP and believed it to be more prestigious and widely recognized. Donelan, *Costs and Benefits of Personal Financial Planning Accreditation*, J. Accountancy, September 1993.

To the extent that the Florida BOA considers personal financial planning to be a specialty of the practice of public accountancy, then it may have statutory authority to prohibit the use of specialties within public accounting, like the PFS specialty designation. However, the CFP Board believes the BOA's reasoning to be fallacious and a clear overreach of statutory authority when its regulatory action reaches into disciplines over which the BOA has no jurisdiction.

The CFP Board *Code of Ethics and Professional Responsibility* says that "personal financial planning" or "financial planning" denotes the process of determining whether and how an individual can meet life goals through the proper management of financial resources. The "financial planning process" denotes the process which typically includes, but is not limited to, the six elements of data gathering, goal setting, identification of financial issues, preparation of alternatives and recommendations, implementation of client decisions from among the alternatives, and periodic review and revision of the plan. "Financial planning subject areas", according to the Code, includes the basic subject fields covered in the financial planning process which typically include, but are not limited to, financial statement preparation and analysis (including cash flow analysis, planning and management), investment planning (including portfolio design, asset allocation and portfolio management), income tax planning, education planning, risk management, retirement planning and estate planning. A "financial planning professional" is one who is capable and

qualified to offer objective, integrated, and comprehensive financial advice for the benefit of individuals to help them achieve their financial objectives.

The CFP Board conducted a job analysis in 1987 which identified 175 topics which a competent financial planner would need to know. It is incontestable that a number of topics would be within the knowledge of a competent CPA.[6] However, there are a substantial number of the tasks that a CPA would not have knowledge of just by virtue of holding the CPA credential. The CFP Board has determined that, of the 175 topic areas which a CFP needs to know, a CPA may typically have covered only 30 tax-related topics in his or her educational preparation.[7] It is not the argument of the CFP Board that the two occupations do not overlap, certainly they do. However, the knowledge required of a competent CFP also overlaps with that of attorneys, insurance agents, and securities brokers. "Advisers, including financial planners, offer a variety of services to consumers, from supervising client portfolios and selling financial products to giving advice concerning not just securities, but also insurance, taxes, real estate, and savings."[8] It is this breadth of knowledge that sets the CFP apart, together with the ability to integrate all facets of a

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[6] Tax implications of securities, tax accounting, tax calculations, basis and cost recovery concepts just to name a few.

[7] Life insurance policy selection and replacement, the law of agency as applied to insurance, tort liability as applied to insurance, regulation of securities and markets, options and futures among others.

[8] See H.R. Rep. No. 103-75, 103D Cong., 1st Sess. 18 (1993).

client's personal finances into a comprehensive plan. Thus, it is this comprehensive approach to helping people manage their financial resources that distinguishes financial planners from other advisors, all of whom might focus on one area of a person's finances perhaps to the exclusion of the client's needs in other areas.

The diversity in backgrounds of CFP licensees serves as a final illustration of the difference between financial planners and public accountants. Looking at the types of businesses in which current CERTIFIED FINANCIAL PLANNER mark licensees are engaged, the largest percentage, 37.2% are engaged directly in personal financial planning; 13.9% in securities; 11.7% in accounting; 9.6% in insurance; 5.3% in banking; 1.3% in education; 13.3% miscellaneous other. The percentages holding different kinds of occupational licenses display this pattern: insurance, 62.0%; securities, 61.5%; CPA, 16.6%; real estate, 8.8%; attorney, 2.7%.

This Court wrote in *Peel*, "[w]e appreciate the difficulties that evolving standards for attorney certification present to national organizations like the ABA." *Peel*, 496 U.S. at 104. In a similar vein, one can appreciate the difficulties that the creation and appearance of new or specialized vocations present to the traditional structure of regulatory bodies. The history of the evolution of many trades, guilds, vocations and professions, from eleventh century England and Europe forward, has several longstanding themes. A first theme, is the revival of the movement toward private associations, as the practitioners of new arts and learning found common need for training centers, uniform standards, and forums for the exchange of ideas. Second, association members also

found collective interest in the adoption of ethical codes and, ultimately, in securing public licensure. Finally, entry of new vocations into the economic system often was constrained by the traditional guild or other regulatory structure. S. Rubin, *The Legal Web of Professional Regulation*, in *Regulating the Professions: A Pubic Policy Symposium* 31-35 (R. Blair & S. Rubin eds. 1980). Indeed, the rise of public accounting as a discipline in the United States can be fairly said to have followed this thematic pattern. See generally, J. Carey, *The Rise of the Accounting Profession: From Technician to Professional 1896-1936* (1969). The preceding also appears to describe the financial planning discipline as it has evolved over the past twenty years in this country. See generally, College for Financial Planning, *Twenty Years of Excellence: A Look Back* (1992).

Evolving standards and vocations may create difficulties for regulators, including the BOA. Difficulty, however, fails to rise to the level of necessity when a restriction on commercial speech which is not false, misleading or deceptive is at stake.

2. The CFP Board has not delegated or assigned control and oversight of its ownership rights in its federally registered service marks to any governmental body, specifically not to the BOA.

By virtue of its ownership of the federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER, the CFP Board controls, and is obligated to control use of its marks by licensing their use only to those who meet its requirements, as previously described. The CFP

Board has not delegated or assigned control and oversight of its ownership rights in these marks to any State body, specifically not to the State of Florida Board of Accountancy (BOA).

The CFP Board has not sought approval of the CFP designation from the State of Florida Board of Accountancy as referred to in paragraph 1(g) of Rule 21A-24.001, F.A.C., nor does the CFP Board plan in the future to request such approval for Florida CFP licensees, either for those who are also CPAs or not. In addition to those reasons already argued, the reason that the CFP Board has not in the past requested such approval, nor plans to do so in the future, is because the CFP Board believes that it, and it alone, has the right to control the use of its federally registered service marks CFP and CERTIFIED FINANCIAL PLANNER. The CFP Board believes that the Florida BOA (or any other private or government entity) does not have the right to control the use of its marks.

Any interference by any other organization or regulatory authority in the free use of these marks in interstate commerce constitutes an abridgement of our licensees' commercial free speech rights to provide truthful information to the public about designations or licenses that they have in fact earned. And, any attempt to control the free use of a professional designation actually earned and currently owned is, per se, anticompetitive in nature.

CONCLUSION

The BOA claims that its rules are a "reasonable fit" (J.A. 187, 190) between the public good and the limitations it has imposed on commercial speech. To the contrary, the CFP Board believes that the restraining effect of BOA's orders and rules on the use of the CFP designation, a legitimate and recognized certification and designation, utilized in a field which is distinct from the practice of public accountancy, indefensibly exceeds the *Central Hudson* standards that determine proper scope of restrictions designed to achieve a legitimate governmental interest. The BOA's order and regulations prohibiting CPA-CFP licensees from advertising their claims of certification is in violation of important first Amendment protections for commercial speech. Clarity and consistency of rulings in this area are necessary, and hence this court should overturn BOA's disciplinary order against Ibanez.

Respectfully submitted,

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